No. _____

In The

Supreme Court of the United States

TUNICA-BILOXI GAMING AUTHORITY, et al.,

Petitioners,

versus

ZACHARY ZAUNBRECHER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The State Of Louisiana Court Of Appeal, Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is well established that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S.Ct. 2024, 2030, 188 L.Ed.2d 1071 (2014). "Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . That immunity, we have explained, is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).

In *Michigan v. Bay Mills Indian Cmty.*, *supra*, this Court explained that the "baseline position . . . is tribal immunity; and [t]o abrogate [such] immunity, Congress must unequivocally express that purpose. . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (Citations omitted; internal quotation marks omitted.) *Id.*, 134 S.Ct. at 2031-32.

QUESTION PRESENTED – Continued

In this case, the Louisiana Third Circuit Court of Appeal found subject matter jurisdiction was proper over a tort suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment with the Tribe at the tribal-owned casino located on tribal trust land. (App. 1).

The question presented is:

Whether tribal sovereign immunity extends to individual tribal employees to bar suit against them in state district court for alleged negligent service of alcohol to a lawful purchaser at a tribal-owned casino on tribal trust land.

LIST OF PARTIES

Petitioners: Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort, Jeremy Ponthieux, Nathan Ponthier, and Marissa Martin

Respondents: Zachary Zaunbrecher, *Individually And On Behalf Of His Deceased Father*, Michael Blake Zaunbrecher; and The Estate of Leo J. David

Parent Companies or Subsidiaries: Tunica Biloxi Indians of Louisiana wholly own and operate the Paragon Casino Resort, through the Tunica-Biloxi Gaming Authority. The Tunica-Biloxi Gaming Authority is an unincorporated, subordinated instrumentality and agency of the Tunica-Biloxi Tribal Government. The Tunica-Biloxi Tribe, through the Tribal Gaming Authority, is doing business as the Paragon Casino Resort.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioner Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort states that the Tunica-Biloxi Gaming Authority is an unincorporated, subordinated instrumentality and agency of the Tunica-Biloxi Tribal Government. The Tunica-Biloxi Tribe, through the Tribal Gaming Authority, is doing business as the Paragon Casino Resort.

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TREATISE

PETITION FOR WRIT OF CERTIORARI

Petitioners Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort, Jeremy Ponthieux, Nathan Ponthier, and Marissa Martin, all named as defendants for alleged acts occurring in the course and scope of their employment with the Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort, respectfully petition for Writ of Certiorari to review the judgment of the Louisiana Third Circuit Court of Appeal.

OPINIONS BELOW

The opinion of the Louisiana Third Circuit Court of Appeal (App. 1) is published at 2015-769 (La.App. 3 Cir. 12/9/15), 181 So.3d 885. The Louisiana district court opinion (App. 13) is unpublished. The Louisiana Supreme Court Writ denial without reasons is published at 2016-0049 (La. 2/26/16), 187 So.3d 1002 (Mem). (App. 16).

JURISDICTION

The judgment of the Court of Appeal was entered December 9, 2016. (App. 1). The Louisiana Supreme Court denied Petitioners' timely *Petition* for Writ of review on February 26, 2016. (App. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no relevant constitutional or statutory provisions.

STATEMENT OF THE CASE

The claim arises from a fatal auto accident occurring in the early morning on July 11, 2013 on La. Highway 1 in Avoyelles Parish, State of Louisiana. Plaintiff claims that Leo David crossed the center line and struck Michael Blake Zaunbrecher's vehicle, killing both. The Estate of Leo David and several insurers were named Defendants in the *Original Petition* filed in this matter on or about July 24, 2013. Thereafter, plaintiff amended the *Petition* attempting to join into the instant suit the Tunica-Biloxi Indians of Louisiana through its Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort (hereinafter referred to as the "Tribe") and three individual Tribal Employees, Jeremy Ponthieux, Nathan Ponthier and Marissa Martin (hereinafter referred to as the "Tribal Employees"), who were all employed by the Tribe at Paragon Casino Resort at the time of the events alleged in this *Petition*. Plaintiff has filed an identical suit against the Petitioners in the Tunica-Biloxi Indians Tribal Court alleging the exact same claims, captioned "*Zachary Zaunbrecher, Individually and on behalf of his deceased father, Michael Blake Zaunbrecher vs. Tunica-Biloxi Gaming Authority D/B/A Paragon Casino Resort,*

XYZ Insurance Company, Jeremy Ponthieux, Nathan Ponthier, and Marissa Martin," Suit No. 2014-006.[1] According to the *Supplemental and Amended Petition* and the *Petition* filed in Tribal Court, Leo David consumed alcohol at Paragon Casino Resort in the hours prior to the accident, and Tribal Employees' actions led to the accident. Specifically, plaintiff claims that the following acts proximately caused the accident: 1) Paragon bartender Martin failed to recognize David's impairment and continued to serve him; and 2) Paragon security officers Ponthier and Ponthieux escorted David from the Casino due to his impairment thereby allowing him to gain access to his vehicle. Petitioners deny the allegations and appeared in the instant suit for the limited purpose of asserting various defenses, including the Louisiana Anti-Dram Shop Law, and to object to state court jurisdiction.[2] The Tribe and Tribal Employees lodged a *Declinatory Exception of Lack of Subject Matter Jurisdiction* based on tribal sovereign immunity.[3]

The Paragon Casino Resort is wholly owned and operated by the Tunica-Biloxi Tribe through its

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[1] A copy of the parallel tribal court suit was offered into evidence with Defendants' *Exceptions*, marked as Ex. A and is found at appellate Trial Record (TR) pg. 46-52.

[2] TR pg. 38-44.

[3] Petitioners urged alternative exceptions of *Peremptory Exception of No Cause of Action* and *Lis Pendens*, TR pg. 38-44; however, same were rendered moot when the trial judge granted the *Exception of Subject Matter Jurisdiction*.

Tunica-Biloxi Gaming Authority.[4] All alleged acts of negligence and/or fault by Tribal Employees Martin, Ponthier and Pontheiux claimed in the *Petition* were performed on tribal land at Paragon and were performed as duties in the course and scope of the individuals' employment for the Tribe.[5] Plaintiff's *Supplemental and Amended Petition* specifically alleges that the Tribe is "responsible to all acts of negligence and/or fault of the defendants, Ponthieux, Ponthier, and Martin, under the doctrine of Respondent (sic) Superior."[6]

All facts regarding the Tribe's status are undisputed. The Tunica-Biloxi Tribe is a federally recognized Native-American Tribe with a reservation in Avoyelles Parish, Louisiana.[7] The Tunica-Biloxi Tribe is eligible for services and funding by federal agencies on a sovereign-to-sovereign basis.[8] The Tribe wholly owns and operates the Tribal Enterprise, the Paragon

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[4] *See* the uncontroverted Affidavit of Tunica-Biloxi Tribal Chairman offered without objection in support of Defendants' *Exception*, TR pg. 66-67.

[5] Plaintiff's *Supplemental and Amending Petition* at paragraph 19-24, TR pg. 32-36.

[6] Plaintiff's *Supplemental and Amending Petition* at paragraph 25, TR pg. 32-36.

[7] *See Notice, Proposed Findings for Federal Acknowledgement of the Tunica-Biloxi Indian Tribe of Louisiana*, 45 Fed. Reg. 85872 (1980); *Notice, Final Determination for Federal Acknowledgement of the Tunica-Biloxi Indian Tribe of Louisiana*, 46 Fed. Reg. 38411 (1981).

[8] *See Notice, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 53 Fed. Reg. 52829, 52832 (1988).

Casino Resort, through its Tunica-Biloxi Gaming Authority.[9] The Tunica-Biloxi Gaming Authority is an unincorporated, subordinated instrumentality and agency of the Tunica-Biloxi Tribal Government. The Tunica-Biloxi Tribe, through the Tribal Gaming Authority, is doing business as the Paragon Casino Resort. Paragon is located on tribal land held in trust by the United States Government for the benefit of the Tribe.[10] All alleged acts of negligence and/or fault by the Tribal Employees claimed in the *Petition* were performed on tribal land at Paragon and were performed as duties in the course and scope of the individuals' employment for the Tribe.[11]

The Tunica-Biloxi Indian Tribe owns and operates Paragon Casino Resort pursuant to the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA").[12] Pursuant to IGRA, the Tribe entered into a Tribal State Compact with the State of Louisiana.[13] This Compact was approved by the

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[9] *See* the uncontroverted Affidavit of Tunica-Biloxi Tribal Chairman offered without objection in support of Defendants' *Exception*, TR pg. 66-67.

[10] Affidavit of Tunica-Biloxi Tribal Chairman Joey Barbry offered without objection in support of Defendants' *Exception*, TR pg. 66-67.

[11] *See* Plaintiff's *Supplemental and Amending Petition* at paragraph 19-24, TR pg. 32-36.

[12] The IGRA authorizes and enables Indian Tribes to enter into negotiations for the purpose of establishing Tribal State Compacts governing gaming activities on Indian Lands.

[13] *See* Affidavit of Tribal Chairman, TR pg. 66-67.

Secretary of Interior.[14] In the Compact, the Tribe expressly reserves its sovereign immunity from suit. The Tunica-Biloxi Indians Tribal Gaming Enterprise is situated on "Indian Land" as defined by Section IV(B) of IGRA.[15] Furthermore, in the Compact, the State affirms the Tribe's jurisdiction over civil matters arising on tribal property. The Compact provides in pertinent part:

> "Nothing in this Tribal State Compact shall be deemed to authorize the State of Louisiana to regulate the government of the Tunica-Biloxi Indian Tribe of Louisiana in any matter." Section 2(D).

The Compact further provides:

> "In the interest of clarity of authority and to preserve and protect the health, safety and welfare of all, the Tunica-Biloxi Tribe of Louisiana and the State of Louisiana shall:
>
> (1) Preserve the full territorial and subject matter jurisdiction of the Tunica-Biloxi Tribe of Louisiana." Section 3(C)(1).

On June 26, 2015, the 12th Judicial District Court rendered judgment sustaining the Tribe and Tribal Employee's *Exception of Lack of Subject Matter Jurisdiction*, dismissing all claims against them without prejudice and certifying the judgment for immediate appeal. (App. 13). Plaintiff timely lodged an appeal.

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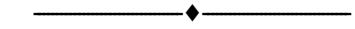
[14] *See Notice, Indian Gaming: Tunica-Biloxi Tribe*, 57 Fed. Reg. 54415 (November 18, 1992).

[15] 25 U.S.C. § 2703(4)(B).

On December 9, 2015, the Louisiana Third Circuit Court of Appeal reversed the judgment sustaining *Exception of Lack of Subject Matter Jurisdiction* as to the Tribal Employees, holding that the Tribal Employees committing alleged acts of simple negligence fully within the course and scope of their employment with the Tribe are exposed for personal liability and tribal sovereign immunity does not bar the suit against them in their individual capacities. (App. 1).

Petitioners timely filed a Writ of Certiorari to the Louisiana Supreme Court raising tribal sovereign immunity as grounds for reversal. The tribal Defendants argued that where the *Petition* fails to assert the Tribal Employees acted outside of their official duties and the authority granted to them by the Tribe, there can be no personal liability/personal capacity claim against them and consequently, tribal sovereign immunity extends to them. On February 26, 2016, the Louisiana Supreme Court denied the Writ without reasons. (App. 16).



REASONS FOR GRANTING THE WRIT

This case presents the Court the opportunity to confirm that tribal sovereign immunity extends to protect Tribal Employees from private suits for money damages when acting in the course and scope of their employment. Considering the number of tribal owned enterprises and the vital role such enterprises play in

promoting the self-determination and economic welfare of Native American tribes, this Court must take up the issue and correct the lower court's error.

I. The Louisiana Third Circuit Court of Appeal ruling involves an important question of federal law that is unresolved by this Court

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[16] Tribal sovereign immunity "predates the birth of the Republic."[17] The immunity rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance.[18] A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit.[19]

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[16] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978).

[17] *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994).

[18] *Id.*; *Santa Clara Pueblo v. Martinez*, 98 S.Ct. at 1675.

[19] *See Kiowa Tribe v. Manufacturing Techs., Inc*., 523 U.S. 751, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130-31 (11th Cir. 1999).

"[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Bay Mills*, 134 S.Ct. at 2031 (internal quotation marks omitted); *see also Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1206 (11th Cir. 2012) (explaining that a tribe's sovereign immunity "is not the same thing as a state's Eleventh Amendment immunity" because tribes are more akin to foreign sovereigns).

Tribal immunity applies to suits brought by States as well as those brought by individuals. *Bay Mills*, 134 S.Ct. at 2031. Tribal immunity also applies "for suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Id.* (*citing Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)). Generally, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in Defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (per curiam).

This Court has not previously decided whether a state court has jurisdiction in a tort action against Tribal Employees for alleged acts occurring on tribal land. It is clear, however, that the decision is one that should properly be decided by this Court as it squarely falls under federal law. "Given Congress' plenary authority over Indian affairs, federal law may define or limit the scope of a tribal officer's lawful authority." *Cash Advance and Preferred Cash Loans v. State*, 242

P.3d 1099, 1112 (Colo. 2010); *see Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. 1670.

This Court's most recent pronouncement on tribal sovereign immunity, *Michigan v. Bay Mills,*[20] declared that a state had no power to enjoin a tribe from operating a casino off Indian lands on grounds that Tribe sovereign immunity barred the action. This Court explained:

> As "domestic dependent nations," Indian tribes exercise sovereignty subject to the will of the Federal Government. Sovereignty implies immunity from lawsuits. Subjection means (among much else) that Congress can abrogate that immunity as and to the extent it wishes. If Congress had authorized this suit, Bay Mills would have no valid grounds to object. But Congress has not done so . . . We will not rewrite Congress's handiwork. Nor will we create a freestanding exception to tribal immunity for all off-reservation commercial conduct.[21]

Thus, it is clear any claim that imposes on tribal sovereignty necessarily arises under federal law. First, Zaunbrecher's claim against the Tribal Employee Defendants imposes upon the Tunica-Biloxi Tribe's sovereignty in that Plaintiff seeks money damages against it. Although Plaintiff purports to only be after money from Ponthieux, Ponthier and Martin, and the Appeals Court advances that fiction, it is clear that

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[20] *Supra*.

[21] *Bay Mills*, 134 S.Ct. at 2039 (internal citation omitted).

any judgment against the Tribal Employee Defendants would be satisfied from tribal funds. Would the plaintiff and the Court of Appeal have the Tunica-Biloxi Tribe leave its employees exposed to financial hardship when they have done nothing more than perform the duties assigned to them?

Second, this claim imposes upon the Tunica-Biloxi Tribe's sovereignty in that the state court seeks to define and limit the bounds of the Tribe's right to contract with its employees, delegate duties to them, and conduct internal business as it sees fit. In holding that Tribal Employees are acting in a personal capacity, the Appeals Court threatens the Tribe's potential for growth by imposing unreasonable risk on its employees. Likewise, the decision threatens the Tribe's autonomy and ability to attract qualified individuals for its workforce.

While this Court has previously addressed a state court's power to hear certain claims against tribal officials, none of those cases involved a suit for money damages. In this Court's recent pronouncement in *Bay Mills*, *supra*, the Court noted that the State of Michigan could bring suit against tribe officials or employees, but only in reference to injunctive relief. *Id.* at 2035. In *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*,[22] this Court considered whether a Washington state court had jurisdiction to preside over a case against individual tribal members involving their fishing activities, including off the reservation. This Court

[22] 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

specifically noted that the suit was one to enjoin individual tribal members. The Court found the state court could proceed against the individuals, but analogized the issue to prosecution of individual Indians for crimes committed off and on Indian land,[23] an area of law not historically recognized as subject to the Tribe's inherent sovereign immunity. Unlike injunction, criminal prosecution and other equitable, prospective relief, Zaunbrecher's dram shop suit involving a casino patron's alcohol consumption on tribal land is an area traditionally recognized as subject to tribal sovereign immunity. *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2016), *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, 315 P.3d 359 (Ok. 2013) (*reh'g denied*, Dec. 2, 2013).

The fact that the unfortunate auto accident giving rise to this suit occurred off reservation is of no moment, because all alleged tortious acts claimed to have been committed by the Tribal Employee Defendants occurred at Paragon Casino Resort in the context of performing employment for the Tribe. Plaintiff's claim against the Tribe and Tribal Defendants is derived from and dependent upon acts that occurred while David was patroning the Tribe's establishment on tribal land. By patroning the Paragon Casino, David entered a consensual relationship with the tribe and subjected himself to tribal regulation. "Despite [some] limitations [to tribal jurisdiction] . . . , the [United States Supreme] Court has consistently acknowledged

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[23] 97 S.Ct. at 2620.

that '[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.'"[24] "[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts."[25]

II. The ruling in this case conflicts with decisions by the highest court of the state of Connecticut and Washington, decisions from the United States Courts of Appeals and the intent of the U.S. Congress

With no controlling precedent from this Court, the various state courts and federal courts of appeals addressing sovereign immunity over tribal individuals for tort damages have reached differing results. The Court should bring clarity to the issue by granting this Writ of Certiorari. The decision in this case should be reversed and the *Judgment of Partial Dismissal* reinstated on grounds that tribal sovereign immunity bars a state court suit against the Petitioners for money damages.

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[24] *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 171 (5th Cir. 2014), *writ granted*, 135 S.Ct. 2833 (2015); *citing Iowa Mutual v. LaPlante*, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

[25] *Dolgencorp*, 746 F.3d at 171; *citing Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (quotation and brackets omitted).

In *Lewis v. Clarke*,[26] the Connecticut Supreme Court recently ruled that tribal sovereign immunity barred suit for negligence against an individual Tribal Employee. In that case, the Tribal Employee was operating a tribal-owned limousine on the interstate in Norwalk, Connecticut in the course and scope of his employment with the Mohegan Tribe. Plaintiff was a passenger in a third-party vehicle rear-ended by the limousine. According to tribal Affidavits, the Defendant was driving patrons of the Mohegan Sun Casino to their homes. *Id.* Like the plaintiff in the instant suit, Lewis attempted to circumvent tribal sovereign immunity by naming limousine driver Clarke in his personal capacity. Further, plaintiff claimed (as Zaunbrecher asserts here) that damages were only sought from and would only be collected from the individual and not the tribe. In rejecting the plaintiff's argument, the Connecticut Supreme Court noted:

> "'[C]laimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity. . . . Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject [t]ribes to damages actions for every violation of state

[26] 320 Conn. 706 (2016).

> or federal law. The sounder approach is to examine the actions of the individual tribal defendants."[27]

On reviewing the *Zaunbrecher Petition*, it is immediately evident that Plaintiff inserted the buzz words "individual capacity" merely to avoid tribal sovereign immunity. The *Petition* fails to articulate *any* facts giving rise to a personal capacity claim. Plaintiff expressly asserts the Tribal Employees were in the course and scope of their employment with the Tribe. There is no allegation the Tribal Employees stepped outside of their role as agents for the Tribe or acted beyond the authority bestowed upon them by the Tribe. The *Petition* expressly states that the Tribe is vicariously liable for their actions. The Tribe's vicarious liability is not presented as an alternative theory. All factual allegations of the *Petition* are directly inconsistent with a personal capacity claim. Based on the record presented, Plaintiff failed to state a sufficient basis for denying immunity to the Tribal Employees. The appeals court ruling condones the sham pleading of individual capacity that the Connecticut Supreme Court and other courts have refused to allow.

In *Chayoon v. Sherlock*,[28] the Appellate Court of Connecticut aptly noted that it is insufficient for the plaintiff merely to allege that the Defendants violated

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[27] *Id.* at 706, *quoting Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002).

[28] 89 Conn.App. 821, 877 A.2d 4 (2005), *writ denied*, 547 U.S. 1138, 126 S.Ct. 2042, 164 L.Ed.2d 797 (2006).

the law in order to state a claim that they acted beyond the scope of their authority.[29] The court explained that "[s]uch an interpretation would eliminate tribal immunity from damages actions, because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief" and "[i]n order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted 'without any colorable claim of authority. . . .'"[30] Thus, Zaunbrecher cannot merely allege that the Tribal Employees committed an act of negligence and thereby circumvent tribal sovereign immunity. He must allege that they "acted manifestly or palpably"[31] beyond their authority in their conduct. He has failed to do so and tribal immunity prohibits the claim.

"In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads – and it is shown – that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe."[32] "Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity. . . . [A] tribal official – even if sued in his individual capacity – is only stripped of tribal immunity when he acts manifestly or

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[29] 89 Conn.App. at 829; *Bassett*, 221 F.Supp.2d at 280-82.

[30] *Chayoon v. Sherlock*, 89 Conn.App. at 829-30; *quoting Bassett*, 221 F.Supp.2d at 281 (internal quotations omitted).

[31] *Chayoon v. Sherlock*, 89 Conn.App. at 829.

[32] *Bassett*, 221 F.Supp.2d at 281.

palpably beyond his authority. . . ."[33] (internal quotation marks omitted). "[I]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their . . . authority; [the plaintiff] also must allege or otherwise establish facts that reasonably support those allegations." (internal quotation marks omitted).[34] *See also Bynon v. Mansfield*, 2015 WL 2447159 (E.D. Pa. 2015) (tribal sovereign immunity bars suit when all factual allegations regarding individual tribal Defendant pertain to his role as manager of tribal lending enterprise and there are no facts implicating him in any misconduct outside of his employment with the enterprise; "Without factual allegations to state a plausible claim against [individual tribal defendant] personally, [plaintiff's] assertion that she has sued [him] only in his individual capacity is without weight."). *Id.* at *2. *See also Grace v. Thomas*, 2000 WL 206336 *3 n.2 (E.D. Mich. 2000) ("The Court observes that Plaintiffs have named the individual Defendants in their individual capacities; however, upon careful review of the pleadings, it is clear as a matter of law that the individuals were not acting in their personal capacities. Plaintiffs failed to show any evidence that the individual Defendants were not exercising the powers delegated to them by the sovereign or that the conduct in which they engaged was unrelated to their job duties."); *see also Murgia v. Reed*, 338 Fed.Appx. 614, 616

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[33] *Id.*

[34] *Hultman v. Blumenthal*, 67 Conn.App. 613, 624, 787 A.2d 666 (2002), *cert. denied*, 259 Conn. 929, 793 A.2d 253 (2002).

(9th Cir. 2009) ("If the Defendants were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit regardless of whether the words 'individual capacity' appear on the complaint.").

In *Sheffer v. Buffalo Run Casino, PTE, Inc.*, the Oklahoma Supreme Court affirmed dismissal of tribal Defendants on tribal sovereign immunity grounds in a dram shop case.[35] The Oklahoma Supreme Court held the Peoria Tribe was immune from dram-shop liability in state court, and the state high court noted that, in doing so, they aligned themselves "with all other courts addressing this issue."[36]

Even assuming the *Petition* sufficiently alleged the tribal Defendants acted beyond the scope of their lawful authority, they would lose immunity only for purposes of *prospective injunctive relief*. *Bynon*, 2015 WL 2447159 *2; *Bay Mills*, 134 S.Ct. at 2035; *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*,

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[35] *Sheffer v. Buffalo Run Casino, PTE, Inc*., 2013 OK 77, 315 P.3d 359, 370 (Ok. 2013) (*reh'g denied*, Dec. 2, 2013).

[36] *Id.* at 373; *citing Durante v. Mohegan Tribal Gaming Authority*, 2012 WL 1292655 at *5 (unpublished) (finding the Mohegan tribe immune from a private dram-shop claim); *Foxworthy v. Puyallup Tribe of Indians Assoc.*, 141 Wash.App. 221, 169 P.3d 53 (2007) (finding the Puyallup tribe was immune from dram-shop liability in state court); *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78, 84 (2006) (concluding Arizona state courts lacked jurisdiction to adjudicate a private dram-shop action against the Tohono O'Odham Nation); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. App. – El Paso 1997) (finding Ysleta Del Sur Pueblo's sovereign immunity was not waived "for a *private suit* brought under the Texas Dram Shop Act").

177 F.3d 1212, 1226 (11th Cir. 1999) ("[T]ribal officers are protected by tribal sovereign immunity when they act in their official capacity and within the scope of their authority; however, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority."). In a suit for money damages, tribal immunity also protects Tribal Employees acting in their official capacities and within the scope of their authority, as the relief would run directly against the tribe itself. *Whiting v. Martinez*, 2016 WL 297434 *3; *see also* Cohen's Handbook of Federal Indian Law § 7.05[1][a], at 638 (Nell Jessup Newton et al. eds., 2012) ("Suits for damages against employees or officers in their individual capacities are barred by qualified immunity unless the alleged actions were not colorably within the authority delegated by the tribe."). Tribal officials may be subject to suit for equitable relief in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands. *See Bay Mills*, 134 S.Ct. at 2034-35. By contrast, a claim seeking money damages is not a remedy available under the *Ex parte Young*-type exception. *Gingras, et al. v. Rosette, et al.*, 2016 WL 2932163 *5 (D. Vermont 2016). *See also Arizona v. Tohono O'Odham Nation*, 2016 WL 1211834 *10 (9th Cir. 2016), ___ F.3d ___ (although the tribe may be sued for injunctive relief under the IGRA's limited abrogation of tribal sovereign immunity, the district court lacks subject matter jurisdiction over state's tort claims against the tribe due to tribal sovereign immunity). *See also Ferguson v. SMSC Gaming Enter.*, 475 F.Supp.2d 929, 931 (D.Minn. 2007) ("A mere claim that

[the individual defendant] made an error in exercising his authority is not sufficient."); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 310 (N.D.N.Y. 2003) (holding individual Defendants who were alleged to have violated state law and acted outside the scope of their authority were immune from suit because no allegations were made that the Defendants acted " 'without any colorable claim of authority' " (quoting *Bassett*, 221 F.Supp.2d at 281)).

Having shown that the appeal court decision denying sovereign immunity is directly contrary to decisions from other significant courts, Petitioners now show that the instant ruling is contrary to the will of the Congress. Allowing a party to side-step tribal immunity by merely using the magic phrase "individual capacity" undermines the traditional protections recognized in this country. Congress alone has been bestowed with the privilege and burden of securing those protections. The appeal court decision in this matter is blatant judicial overreach to get to tribal entities where Congress has not authorized.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 118 S.Ct. 1700, 1702. This Court noted in *Bay Mills*, as it had in numerous cases before, that it is not the Court's place to act as a substitute for the legislative process when the outcome of a case seems outdated or contrary to perceived modern societal norms. *Bay Mills*, 134 S.Ct. at 2038. In the face of judicial pronouncement from this Court upholding tribal sovereign immunity,

Congress has not acted. Justice Sotomayor aptly noted the following in the concurring opinion:

> All that we said in *Kiowa* applies today, with yet one more thing: Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following *Kiowa*, Congress considered several bills to substantially modify tribal immunity in the commercial context. Two in particular – drafted by the chair of the Senate Appropriations Subcommittee on the Interior – expressly referred to *Kiowa* and broadly abrogated tribal immunity for most torts and breaches of contract. See S. 2299, 105th Cong., 2d Sess. (1998); S. 2302, 105th Cong., 2d Sess. (1998). But instead of adopting those reversals of *Kiowa*, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval. See Indian Tribal Economic Development and Contract Encouragement Act of 2000, § 2, 114 Stat. 46 (codified at 25 U.S.C. §81(d)(2)); see also F. Cohen, Handbook of Federal Indian Law § 7.05[1][b], p. 643 (2012). Since then, Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others, but never adopting the change Michigan wants. So rather than confronting, as we did in *Kiowa*, a legislative vacuum as to the precise issue presented, we act today against the backdrop of a

> congressional choice: to retain tribal immunity (at least for now) in a case like this one. *Bay Mills*, 134 S.Ct. at 2038-39 (internal citations omitted).

The Third Circuit erred in finding that this Plaintiff states a personal liability claim against the tribal Defendants and may pursue money damages against the Tribe under the auspices of an individual capacity claim against them. Alleging nothing more than service of alcohol to an impaired person and escorting him from the premises (allegations which are denied here) is insufficient and certainly should not serve to defeat a challenge on tribal sovereign immunity. There is no allegation of special circumstances or other fault, nor any claim that the Tribal Employees acted beyond their authority. Thus, the employees are entitled to tribal sovereign immunity and judgment dismissing this suit without prejudice should be reinstated.

III. Alternatively, the state court should stay proceedings pending exhaustion of tribal court remedies

Zaunbrecher has an identical action against Petitioners in tribal court for the Tunica-Biloxi Indians.[37] If tribal sovereign immunity is not recognized as a bar to this claim, the tribal Defendants will be required to defend the exact same claim in two separate forums. The burden of legal costs and fees, inconvenience to the

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[37] *See* Ex. A, at TR pg. 46-52, a copy of tribal court *Petition* filed by Plaintiff.

witnesses, and the potential for inconsistent discovery and/or evidentiary rulings are significant concerns. Most importantly, the tribal Defendants are exposed to conflicting judgments on the merits if these claims are not dismissed from the state court suit. Petitioners urge this Honorable Court, in the alternative and only if the Court is not inclined to reverse the Third Circuit's decision on subject matter jurisdiction, to instead stay the instant suit, pending disposition of the identical action in tribal court.

CONCLUSION

For the foregoing reasons, the *Petition* for Writ of Certiorari should be granted.

Respectfully submitted,

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May 26, 2016

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

15-769

ZACHARY ZAUNBRECHER, ET AL.

VERSUS

THE SUCCESSION OF LEO J. DAVID, ET AL.

****

APPEAL FROM THE
TWELFTH JUDICIAL DISTRICT COURT
PARISH OF AVOYELLES, NO. 2013-9544-B
HONORABLE WILLIAM BENNETT,
DISTRICT JUDGE

****

BILLY HOWARD EZELL
JUDGE

****

Court composed of Elizabeth A. Pickett, Billy Howard Ezell, and John E. Conery, Judges. [EAP BHE JEC]

REVERSED IN PART; AFFIRMED IN PART; REMANDED.

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Marissa Martin

EZELL, Judge.

Zachary Zaunbrecher appeals a trial court judgment which dismissed his suit against the Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort (Paragon Casino), Marissa Martin, Jeremy Ponthieux, and Nathan Ponthier for lack of subject matter jurisdiction based on tribal sovereign immunity. On appeal, Mr. Zaunbrecher does not complain about the dismissal of Paragon Casino. He argues that his claims against the three individual defendants should not have been dismissed because they are not entitled to sovereign immunity.

FACTS

Paragon Casino is owned by the Tunica Biloxi Tribe through its Tunica Biloxi Gaming Authority. According to the petition and amending petition, Leo David went to the Paragon Casino on July 10, 2013, at 5:30 p.m. Ms. Martin was bartending that night and serving drinks to Mr. David. Twelve hours later, at approximately 6:00 a.m. on July 11, 2013, Mr. David was approached by two casino security guards, Mr. Ponthieux and Mr. Ponthier. Due to his intoxication, Mr. David was asked to leave the casino. Mr. Ponthieux and Mr. Ponthier escorted Mr. David to his automobile.

Once in his vehicle, Mr. David proceeded north on Louisiana Highway 1. Within five miles of the casino, Mr. David crossed the center line of the highway, striking Blake Zaunbrecher's vehicle, who was travelling

south on Highway 1. Both Blake Zaunbrecher and Mr. David were killed as a result of the accident.

Zachary Zaunbrecher (Mr. Zaunbrecher), the son of Blake Zaunbrecher, filed suit against the estate of Mr. David, his insurer, and Louisiana Farm Bureau, the uninsured motorist insurer of Blake Zaunbrecher. He later amended his petition to add Paragon Casino, Ms. Martin, Mr. Ponthieux, and Mr. Ponthier (hereinafter collectively referred to as "casino defendants") as defendants. The casino defendants answered the petition and filed exceptions of lack of subject matter jurisdiction, no cause of action, and lis pendens.

A hearing on the exception of lack of subject matter jurisdiction was held on May 18, 2015. The trial court granted the exception of lack of subject matter jurisdiction and dismissed all of Mr. Zaunbrecher's claims against the casino defendants. Mr. Zaunbrecher then filed the present appeal.

SOVEREIGN IMMUNITY

On appeal Mr. Zaunbrecher argues that trial court erred in granting the exception of lack of subject matter jurisdiction as to Ms. Martin, Mr. Ponthieux, and Mr. Ponthier because, even though they are employees of Paragon Casino, they do not enjoy sovereign immunity for their individual tortious actions. Mr. Zaunbrecher does not contest that Paragon Casino has sovereign immunity as an instrumentality of the Tribe. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998), which held that tribal

sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. Mr. Zaunbrecher argues that the three individual defendants are not the Indian Tribe and as such enjoy no sovereign immunity.

Whether a court has subject matter jurisdiction is a question of law which is reviewed de novo. *State v. Murphy Cormier Gen. Contractors, Inc.*, 15-111 (La.App. 3 Cir. 6/3/15), 170 So.3d 370, *writ denied*, 15-1297 (La. 9/25/15), ___ So.3d ___. A party raising a sovereign immunity defense challenges the subject matter jurisdiction of the state court. *Id.*

Tribal sovereign immunity does extend to a tribal officer who is acting in his or her official capacity and within the course and scope of his or her authority. *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221, 129 S.Ct. 2159 (2009). Tribal immunity also protects tribal employees who are acting in their official capacity and within the course and scope of their authority. *Id.* The reason for extending sovereign immunity to tribal officials and employees is to protect an Indian tribe's treasury and prevent a plaintiff from bypassing tribal immunity by naming a tribal official or employee. *Id.* However, while a state court may not exercise jurisdiction over a recognized Indian tribe, **a state court does have authority to adjudicate the rights of individual defendants when personal jurisdiction is proper**. *Puyallup Tribe, Inc. v. Dep't of Game of State of Washington*, 433 U.S 165, 97 S.Ct. 2616 (1977).

Therefore, the question before us is whether these three individual defendants were sued in their capacities as employees of Paragon Casino or in their individual capacities. "As a general matter, individual or '[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law,' and that were taken in the course of duties." *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985) (alterations in original). "An officer sued in his individual capacity, in contrast, although entitled to certain 'personal immunity defenses['], . . . cannot claim *sovereign* immunity from suit, 'so long as the relief is sought not from the [government] treasury but from the officer personally.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240, 2267-68 (1999) (emphasis in original) (second alteration in original).

In *Cook*, 548 F.3d 718, the plaintiff sued several casino employees for damages when she was hit by a drunk driver who was an employee of a tribal casino and had been served free drinks by other casino employees after she was obviously intoxicated. Casino employees then allowed their fellow employee to take a casino-run shuttle bus to her car so that she could drive home. The court recognized that the plaintiff sued the casino employees in name but sought recovery from the tribe because the complaint alleged that the tribe was vicariously liable for all actions of the casino employees. The court held that "[p]laintiffs such as Cook cannot circumvent tribal immunity through 'a

mere pleading device.'" *Id.* at 727 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71, 109 S.Ct. 2304 (1989)).

However, in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), the court found that a claim could be brought against tribal fire department medics in their individual capacities. The court concluded "that the Viejas Fire paramedics do not enjoy tribal sovereign immunity because a remedy would operate against them, not the tribe." *Id.* at 1087. Utilizing a remedy-focused analysis, the court reasoned that "[d]ue to 'the essential nature and effect' of the relief sought, the sovereign is not 'the real, substantial party in interest.'" *Id.* at 1088 (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 65 S.Ct. 347 (1945)).

In the present case, Mr. Zaunbrecher's petition alleges specific acts of negligence against the three casino employees, all of which occurred on casino property. While Mr. Zaunbrecher does assert that Paragon Casino is liable for the negligence and fault of the three individual defendants, there are also allegations pointing to the personal liability of the three individual defendants.

In *Canter v. Koehring Co.*, 283 So.2d 716, 721 (La.1973), *superseded by statute on other grounds*, La.R.S. 23:1032 (emphasis added) (footnote omitted), the Louisiana Supreme Court set out four criteria that must be satisfied to impose individual liability on an

employee for injury to a third person caused by the employee's breach of an employment-imposed duty:

> 1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of which has caused the damage for which recovery is sought.
>
> 2. This duty is delegated by the principal or employer to the defendant.
>
> 3. The defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. *The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances-whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.*
>
> 4. With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiffs damages. If the defendant's general responsibility has been

> delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or mal-performance and has nevertheless failed to cure the risk of harm.

Regarding Ms. Martin's individual liability, Mr. Zaunbrecher alleged that she was specifically trained in the ability to recognize impairment of individuals and had a duty to refrain from serving alcohol to such individuals. He claims that Ms. Martin's failure to recognize Mr. David's impairment, continuing to serve him, and failure to notify tribal leaders was negligent. From these facts as alleged, a trier of fact could determine that Ms. Martin had a personal duty toward Mr. David to stop serving him alcohol, preventing him from causing injury to himself or another person.

Regarding Mr. Zaunbrecher's claims against Mr. Ponthieux and Mr. Ponthier, he specifically alleged that they were trained to recognize impaired individuals and how to handle such individuals. In his negligent entrustment claim, Mr. Zaunbrecher further alleged that the security guards escorted Mr. David from the casino due to his intoxication, granting him access to his car, which led to the death of Mr. Zaunbrecher's father.

In light of the allegations in the petition, we conclude that Mr. Zaunbrecher has asserted personal liability claims against these three individuals by

alleging that they had knowledge of his intoxicated condition and owed personal duties to Mr. David while he was drinking which led to the death of his father, Blake Zaunbrecher. We find that sovereign immunity in this case does not bar the suit against the Paragon Casino employees in their individual capacities. "Any damages will come from their own pockets, not the tribal treasury." *Maxwell*, 708 F.3d at 1089. We find the trial court erred in granting an exception of subject matter jurisdiction as to Ms. Martin, Mr. Pontheaux [sic], and Mr. Pontier [sic].

LIS PENDENS

On appeal, the casino defendants have asked this court to stay the instant matter, pending disposition of the identical action in tribal court. We first observe that Paragon Casino is not a necessary party to this suit. Based on this court's ruling in *Atwood v. Grand Casinos of Louisiana, Inc.-Coushatta*, 01-1425 (La.App. 3 Cir. 6/5/02), 819 So.2d 440, *writ denied*, 02-1873 (La. 10/14/02), 827 So.2d 426, Paragon Casino is not a necessary party to these proceedings. In *Atwood*, this court held that the Coushatta Tribe was not a necessary party in a suit by a patron against a tribe employee and the company that managed the casino for defamation. We determined that the Coushatta Tribe faced vicarious liability as the employer of the casino personnel and also could have ratified or authorized the employee's defamatory statements, which is ordinarily an individual tort not subject to solidary liability. Pursuant to La.Code Civ.P. arts. 643 and 1789, we

held that even if the Coushatta Tribe was jointly liable with its casino employees, it was not a necessary party because suit could be filed against one or more solidary obligors without joining all solidary obligors. Therefore, Paragon Casino is not a necessary party in the state court proceedings in order for the trial court to decide the personal liability of the three individual defendants. However, the casino defendants further argue that a stay should be granted because they will be required to defend the exact same claim in two separate forums.

Louisiana Code of Civil Procedure Article 532 allows a court to stay proceedings when suits are pending in federal and state courts. We find no law, nor have the casino defendants cited any to us, which permits a state court to stay proceedings when there is a pending action in a tribal court. Comments (a) and (b) to La.Code Civ.P. art. 532 contemplate application of the article in a foreign jurisdiction.

Even if La.Code Civ.P. art. 532 is applicable to this matter, the stay of proceedings is discretionary with the trial court. While the casino defendants did file an action of lis pendens in the trial court, this matter was not considered by the trial court. Therefore, we remand this matter to the trial court for consideration of whether the requirements of La.Code Civ.P. art. 532 are met and whether it, in its discretion, wants to stay all proceedings. *See Gulf Coast Mineral, LLC v. Grothaus*, 09-685 (La.App. 3 Cir. 12/9/09), 26 So.3d 909, *writ denied*, 10-431 (La. 5/21/10), 36 So.3d 231.

For the reasons expressed in this opinion, the judgment of the trial court granting the exception of subject matter jurisdiction as to Marissa Martin, Jeremy Ponthieux, and Nathan Ponthier is reversed. The judgment of the trial court granting the exception of subject matter jurisdiction as to the Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort is affirmed. Costs of this appeal are assessed to Marissa Martin, Jeremy Ponthieux, and Nathan Ponthier. The case is remanded to the trial court for further proceedings.

REVERSED IN PART; AFFIRMED IN PART; REMANDED.

ZACHARY ZAUNBRECHER, INDIVIDUALLY and on behalf of His deceased father, MICHAEL BLAKE ZAUNBRECHER	**SUIT NO. 2013-9544 DIV. "B"**
VERSUS	**12TH JUDICIAL DISTRICT COURT**
THE SUCCESSION OF LEO J. DAVID, LOUISIANA FARM BUREAU INSURANCE COMPANY and XYZ INSURANCE COMPANY	**PARISH OF AVOYELLES**
	STATE OF LOUISIANA

PARTIAL FINAL JUDGMENT

(Filed Jun. 4, 2015)

Consideration of the Declinatory Exception of Lack of Subject Matter Jurisdiction filed on behalf of the Tunica Biloxi Indians of Louisiana through the Tunica Biloxi Gaming Authority, a subordinate agency and instrumentality of the government of the Tunica Biloxi Indians of Louisiana, doing business as Paragon Casino Resort, Jeremy Ponthieux, Nathan Ponthier and Marissa Martin came for hearing on May18, 2015. Present in Court were:

Robert Marionneaux	**Counsel for Zachary Zaunbrecher, individually and o/b/o his deceased father, Michael Blake Zaunbrecher**

Amanda G. Clark — **Counsel for Tunica Biloxi Indians of Louisiana, Paragon Casino Resort, Jeremy Ponthieux, Nathan Ponthier and Marissa Martin**

Considering the record of this matter, including the pleadings, denials, admissions and properly admitted evidence, and in accordance with the reasons of this Honorable Court which were orally assigned in open court,

IT IS HEREBY ORDERED THAT the Exception is sustained as this Honorable Court lacks subject matter jurisdiction to adjudicate the claims asserted in this lawsuit against defendants Tunica Biloxi Indians, Jeremy Ponthieux, Nathan Ponthier, and Marissa Martin; and

IT IS HEREBY ORDERED THAT all claims against defendants Tunica Biloxi Indians, Jeremy Ponthieux, Nathan Ponthier, and Marissa Martin are dismissed without prejudice, at plaintiffs costs, and expressly reserving unto the plaintiff all rights and claims against the remaining defendants, the Succession of Leo J. David and XYZ Insurance Company. This Honorable Court has determined that there is no just cause for delaying appellate review of this ruling, and therefore, the judgment is designated as a final and partial judgment.

THUS DONE AND SIGNED this 4 day of June, 2015, at Marksville, Louisiana.

/s/ William J. Bennett
HONORABLE
WILLIAM J. BENNETT
JUDGE, 12TH JUDICIAL
DISTRICT COURT

RULE 9.5 CERTIFICATE

I HEREBY CERTIFY that I circulated this proposed Partial Final Judgment to counsel for all parties by electronic mail on May 19, 2015, and the parties have confirmed that they have no opposition to same.

Certified this 1st day of JUNE, 2015.

Respectfully Submitted,

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The Supreme Court of the State of Louisiana

ZACHARY ZAUNBRECHER, ET AL.

VS. NO. 2016-C-0049

THE SUCCESSION OF LEO J. DAVID, ET AL.

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IN RE: Jeremy Ponthieux; Marissa Martin; Nathan Ponthier; Tunica-Biloxi Gaming Authority d/b/a Paragon Casino Resort; – Defendant(s); Applying For Writ of Certiorari and/or Review, Parish of Avoyelles, 12th Judicial District Court Div. B, No. 2013-9544; to the Court of Appeal, Third Circuit, No. 15-769;

– – – – – –

February 26, 2016

Denied.

SJC

BJJ

JLW

GGG

MRC

JDH

Supreme Court of Louisiana
February 26, 2016

/s/ Carmen B. Young

Deputy Clerk of Court
For the Court